# Dato' Seri Anwar bin Ibrahim & Anor v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEALS NO W–05–24 OF 2000 AND NO W–05–25 OF 2000
LAMIN PCA, AHMAD FAIRUZ AND DENIS ONG JJCA
4 JULY 2000

***Evidence*** *— Witness — Calling of witness by defence — No useful purpose would be served to call witness as his evidence would not be relevant — Whether legal right of accused to call witness — Whether High Court decision in disallowing witness to be called appealable — Evidence Act 1950 s 136*

The High Court judge had ruled that under s 136 of the Evidence Act 1950 no useful purpose would be served to call the Prime Minister to testify as his evidence would not be relevant. Upon appeal, the prosecution raised a preliminary objection that the decision of the High Court judge was not appealable because the said decision did not come within the meaning of the word 'decision' as defined in s 3 of the Courts of Judicature Act 1964. It was also submitted that the calling of a witness by a party is not a legal right.

**Held,** striking out the appeal:

(1) The ruling of the High Court judge was one made in the course of a trial as it was still at the stage of the defence. The decision to call or not to call a witness cannot relate or cannot have the effect to finally dispose of the rights of the parties. Thus, the ruling did not come within the meaning of 'decision' and was not appealable (see p 641A–B).

(2) In the context of legal process, it appears that it is not a matter of 'right' of any party to call a witness. Rather it is only a right to apply for a summons to be issued. In law a party cannot be denied of the benefit of a witness who is prepared to give material or relevant evidence. He has a right to call such a witness and therefore a summons will only issue to such person. He has no right, legal or otherwise, to call any person not in possession of such evidence. So in the final analysis, it is the court that decides and has control in the matter of calling witnesses in a criminal case so that only material witnesses will be summoned (see p 642F–H).

**[Bahasa Malaysia summary**

Hakim Mahkamah Tinggi telah memutuskan bahawa di bawah s 136 Akta Keterangan 1950, tiada manfaat akan diperolehi sekiranya Perdana Menteri dipanggil untuk memberi keterangan kerana keterangan beliau tidak relevan. Atas rayuan, pihak pendakwa membangkitkan bantahan permulaan bahawa keputusan

A hakim Mahkamah Tinggi tidak boleh dirayu sebab keputusan tersebut tidak dirangkumi oleh makna perkataan 'keputusan' sebagaimana yang ditakrifkan dalam s 3 Akta Mahkamah Kehakiman 1964. Adalah juga dihujahkan bahawa pemanggilan seseorang saksi oleh sesuatu pihak bukanlah hak menurut undang-undang.

B

**Diputuskan**, membatalkan rayuan tersebut:

(1) Keputusan hakim Mahkamah Tinggi telah dibuat semasa suatu perbicaraan kerana ia masih berada di peringkat pembelaan. C Keputusan sama ada untuk memanggil seseorang saksi atau tidak tidak mungkin berkaitan dengan atau tidak mempunyai kesan menentukan hak pihak-pihak secara muktamad. Justeru itu, keputusan itu tidak diliputi oleh makna 'keputusan' dan tidak boleh dirayu (lihat ms 641A–B).

D (2) Dalam konteks proses undang-undang, kelihatan bahawa bukanlah suatu hal berkenaan 'hak' mana-mana pihak untuk memanggil seseorang saksi. Lebih tepat sekali, ia hanyalah suatu hak untuk memohon supaya satu saman dikeluarkan. Di sisi undang-undang, sesuatu pihak tidak boleh dihalang peluang memperolehi manfaat daripada seorang saksi yang sedia memberi E keterangan yang material atau relevan. Beliau berhak untuk memanggil saksi demikian dan dengan itu satu saman hanya terpakai kepada orang tersebut. Beliau tidak mempunyai hak sama ada mengikut undang-undang atau sebaliknya untuk memanggil sesiapa yang tidak memiliki keterangan sedemikian. Oleh itu, sebagai kesimpulan, mahkamah merupakan badan yang F memutuskan dan mempunyai kawalan tentang pemanggilan saksi dalam kes jenayah supaya saksi material sahaja dipanggil (lihat ms 642F–H).]

G **Notes**

For cases on calling of witness by defence, see 7 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2058–2060.

**Cases referred to**

H *Saad bin Abas & Anor v PP* [1999] 1 MLJ 129 (refd)

**Legislation referred to**

Criminal Procedure Code s 34, Chapter V, Second Schedule, Form I XXXI

Courts of Judicature Act 1964 ss 3, 50(1), 50(2)

Evidence Act 1950 s 136

**Appeal from:** Criminal Trials No 45–51 of 1998 and No 45–26 of 1999 (Court of Appeal, Kuala Lumpur)

*Karpal Singh* (*Aris Rizal Christopher Fernando, Gurbachan Singh* and *Sankara N Nair* with him) (*SN Nair & Partners*) for the first appellant.

*Gobind Singh Deo* (*Karpal Singh & Co*) for the second appellant.

*Mohtar Abdullah* (*Abdul Gani Patail, Azahar Mohamad, Tun Abdul Majid Tun Hamzah, Nordin Hassan* and *Shamsul Sulaiman* with him) (Public Prosecutors, Attorney General's Chambers).

**Lamin PCA** (delivering judgment of the court): This is an appeal against the decision of the learned judge below for refusing to allow the defence to call the Rt Honorable the Prime Minister, Dr Mahathir Mohamad as a witness. The learned judge ruled, inter alia, that under s 136 of the Evidence Act 1950 ('the Act') no useful purpose would be served to call the Rt Honorable the Prime Minister to testify as his evidence would not be relevant. Having so ruled, the subpoena served on Dr Mahathir Mohamad was therefore set aside. The central point of this appeal was on the question of relevancy and the application of s 136 of the Act generally. Before the hearing of the appeal proper, the learned Attorney General gave notice that he would be making a preliminary objection and his objection would be that the decision of the learned judge below was not appealable and the appeal should therefore be struck out. In other words the issue is whether the said decision would come within the meaning of the word 'decision' as defined in s 3 of the Courts of Judicature Act 1964 ('the CJA') as amended by the Amendment Act A1031 of 1998. He submitted that if it did then he would pray for the appeal to be struck out and the case be remitted to the High Court with the direction to the learned judge that the hearing of the case be continued forthwith. We answered in the affirmative. We now give our reasons.

By virtue of sub-s (1) of s 50 of the CJA this court 'shall have jurisdiction to hear and determine any appeal against any decision made by the High Court —' and the word 'decision' is as defined under s 3 of the CJA as amended in 1998 and it reads:

> 'decision' means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose the rights of the parties; ... .

The definition of the word 'decision' clearly 'does not include any ruling made in the course of the trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.' The learned Attorney General submitted that the ruling by the learned judge below was not a final decision as it did not finally dispose of the rights of parties. He also submitted that the calling of a witness by a party is not a legal right. In a criminal case, it is not the right of the prosecution nor is it the right of the defence to call any witness. The main thrust of Mr Karpal Singh's contention on the other hand is that the calling of a witness is as of right and for the accused it is a fundamental right. He however qualified it in that it would be subject to the question of relevancy.

A The issue to be decided here in our view is 'is the ruling not to allow to call a witness is one made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties'.

One thing was clear and it was that the ruling was one made in the B course of a trial as it was still at the stage of the defence. The decision to call or not to call a witness cannot relate or cannot have the effect to 'finally dispose of the rights of the parties'. The final disposal of rights relates to the final outcome of the whole case meaning that the right of the prosecution to prove a charge and the right of the defence to put up its defence. The decision to call or not to call a witness cannot bring to an end the case for C the defence. In *Saad bin Abas & Anor v PP* [1999] 1 MLJ 129, on appeal, both the accused were ordered by the High Court to enter their defence before the learned magistrate below. Instead of complying with the order, they filed a motion for leave to appeal before us under s 50(2) of the CJA. We said that there must be an element of finality in respect of the order to D enter their defence before there can be an appeal. When a court orders an accused to enter his defence, it is a ruling made in the course of a trial and there is no finality as yet until the accused has put up his defence to its final conclusion followed by a decision on the whole case and it is that decision which is appealable. Similarly in the present case, to call or not to call a witness simply means whether there will be or there will be no further E evidence for the defence and such a ruling is a ruling in the course of a trial which has no element of finality because the defence case has yet to be concluded.

Our discussion on 'the rights if the parties' has no concern with the right of a person to be called as a witness nor the right of a person to call a witness. F Of course there is no such thing as a person who is a prospective witness having a right to be called. If at all it is a right of a party to call his witness. Mr Karpal Singh prefers to call it a fundamental right. But he conceded that it is subject to the question of relevancy. Section 136 of the Act is in point. It reads:

G Court to decide as to admissibility of evidence

(1) When either party proposes to give evidence of any fact, the court may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the court shall admit the evidence if it thinks that the fact, if proved, would be relevant, and not otherwise.

H

The very title of the section does not admit any doubt that it is the court to decide on the question of relevancy before the evidence can be admitted. In a criminal case the process to compel the appearance of a person in court is by the issuance of a summons as regulated under Chapter V of the Criminal Procedure Code commencing with s 34. Of I course for the summons to issue there must be an application by the prosecutor if the evidence is to support the case for the prosecution and by the defence if it is to support the case for the defence. By way of

illustration the form of a summons is as provided in Form XXXI in the Second Schedule of the Criminal Procedure Code. For ease of reference we reproduce Form XXXI below:

XXXI — SUMMONS TO A WITNESS

To of

Whereas complaint has been made before me that of has [or is suspected to have] committed the offence of (*state the office concisely, with time and place*) and it appears to me that you are likely to be able to give material evidence respecting the matter of such complaint:

You are hereby summoned to appear before the Magistrate's Court at on the day of next at ten o'clock in the forenoon, to testify what you know concerning the matter of the said complaint, and not to depart thence without leave of the court; and you are hereby warned that if you shall, without just excuse, neglect or refuse to appear on the said date, a warrant will be issued to compel your attendance.

Given under my hand and the seal of the court, this day of , 19

(Seal) Magistrate

If we may repeat the relevant parts of the Form thus:

> Whereas complaint has been made before me that ... and it appears to me that you are likely to be able to give material evidence respecting the matters of such complaint:
>
> You are hereby summoned to appear before the Magistrate's Court at ...

It is for the court to decide the meaning of 'it appears' and 'likely to be able to give material evidence ...'

Strictly speaking the summons will only issue if 'it appears' to the magistrate that the witness is likely to be able to give 'material evidence': We repeat 'material evidence'. Who is to decide whether the evidence is 'material' or 'not'. It must be the trial judge or magistrate. (Note: The format in respect of a summons to compel the attendance of a witness to testify in a criminal trial in the High Court is the same). So in the context of legal process it appears that it is not a matter of 'right' of any party to call a witness. Rather it is only a right to apply for a summons to be issued. In practice, a party intending to call his witness will submit to the magistrate or registrar as the case may be a list of named persons whom he believes will be able to assist his case with full particulars to enable service, and summonses will then issue.

In law a party cannot be denied of the benefit of a witness who is prepared to give material or relevant evidence. He has a right to call such a witness and therefore a summons will only issue to such a person. Hence the wording of Form XXXI. He has no right legal or otherwise to call any person not in possession of such evidence. So in the final analysis it is the court that decides and has control in the matter of calling witnesses in a criminal case so that only material witnesses will be summoned. The process as provided in the Criminal Procedure Code and s 136 of the Act are means to control the gathering of evidence so that only material and

relevant evidence are admitted. So any ruling pertaining to the gathering of evidence in a trial cannot have the element of finality.

For the above reasons we therefore made the order as we did.

*Appeal struck out.*

Reported by Jafisah Jaafar